

Personal Representatives' Access to Protected Health Information

The HIPAA Privacy Rule (“HIPAA”)¹ establishes a foundation of Federally-protected rights which permit individuals to control certain uses and disclosures of their protected health information (“PHI”). Patients have the right to access and copy their records, request restrictions upon the use and disclosure of their PHI, amend their PHI, receive an accounting of all disclosures of their PHI, request confidential information, authorize use and disclosure of their PHI, object to certain uses and disclosures and file a privacy complaint, hereinafter HIPAA rights.² HIPAA recognizes that there are instances where an individual is unable to exercise his or her rights, and another person is authorized to act on his or her behalf with respect to these rights. According to HIPAA, a person authorized to act on behalf of the individual in making health care related decisions is the individual’s “personal representative.”³ HIPAA requires that a personal

¹45 C.F.R. § 164 (2006) *et seq.*

²45 C.F.R. § 164.508 (2006) (right of individual to authorize use and disclosure of PHI); 45 C.F.R. § 164.510 (2006) (right of individual to agree or object to certain uses and disclosures); 45 C.F.R. § 164.522 (2006) (right of an individual to request restriction of uses and disclosures and to request confidential communications); 45 C.F.R. § 164.524 (2006) (right of individual to access PHI); 45 C.F.R. § 164.526 (2006) (right of individual to amend PHI); 45 C.F.R. § 164.528 (2006) (right of an individual to request an accounting of disclosures of PHI); 45 C.F.R. § 164.530(d) (2006) (right of individual to file a privacy complaint). An incarcerated individual’s HIPAA rights may be limited for reasons of safety or security. 45 C.F.R. § 164.524(a)(2)(ii) (2006).

³In an emergency situation, West Virginia law allows emergency medical service personnel to treat an individual, including a minor, without consent even where an individual has named a personal representative, where the personal representative is not reasonably available. W. VA. CODE § 16-4C-17 (2002). HIPAA does not preempt this law, as it “saves” state personal representation laws. 45 C.F.R. § 164.502(g) (2006). This report examines application of the HIPAA personal representative scenario in the context of laws generally applicable to health care providers; it does not address application to health plans. HIPAA does recognize certain uses and disclosures of PHI to avoid a serious threat to a patient’s health or safety. 45 C.F.R. § 164.512(j) (2006). If the opportunity to object to uses or disclosures cannot practically be provided because of an individual’s incapacity or an emergency treatment circumstance, a covered health care provider may use or disclose some of the PHI. 45 C.F.R. § 164.510(a)(3) (2006).

representative be treated with all of the rights of the individual⁴ and recognizes personal representatives in the following areas: adults and emancipated minors, unemancipated minors, and deceased individuals. HIPAA limits disclosure to personal representatives when a covered entity reasonably believes that an individual has been or may be subject to abuse, neglect or endangerment.⁵

1. Adults and Emancipated Minors

HIPAA provides that “[i]f under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.”⁶ Wherever state law gives authority to another to act on behalf of an adult or emancipated minor with respect to health care decisions, the person is a personal representative under HIPAA and can exercise all of the individual’s HIPAA rights. In these instances, state law is not preempted by HIPAA and is “saved.”

a. Medical Power of Attorney Representatives and Surrogates

In West Virginia, competent adults may elect a personal representative through a medical

⁴45 C.F.R. § 164.502(g)(1) (2006).

⁵45 C.F.R. § 164.502(g)(5) (2006). This limitation applies in all cases of personal representation. When a physician or other covered entity reasonably believes that an individual, including an unemancipated minor, has been or may be subjected to domestic violence, abuse or neglect by the personal representative, or that treating a person as an individual’s personal representative could endanger the individual, the covered entity may choose not to treat that person as the individual’s personal representative, if, in the exercise of professional judgment, doing so would not be in the best interest of the individual.

⁶45 C.F.R. § 164.502(g)(2) (2006).

power of attorney.⁷ Adult is defined as someone over the age of eighteen⁸ an emancipated minor⁹ or a mature minor.¹⁰ The West Virginia Health Care Decisions Act sets forth the mandatory procedure to execute a medical power of attorney, such that authority will be properly conferred upon the representative.¹¹ Such appointment is a formal, legal action which gives others the ability to exercise the rights of, or make treatment decisions related to, an individual.

West Virginia law grants the personal representative the same PHI access rights as the individual.¹² HIPAA confers the additional HIPAA rights, including the right to amend PHI, the opportunity to request a restriction on the use and disclosure of PHI, the right to request an accounting of the disclosures, the right to request confidential communication and the right to file a privacy complaint. HIPAA also requires covered entities to treat the personal representative as the patient with respect to obtaining authorization to use or disclose PHI¹³ and to give the

⁷W. VA. CODE § 16-30-4(a) (2002), *amended by* Act of March 8, 2007, 2007 W. Va. Laws Ch. 125 (H.B. 3093). A medical power of attorney may be elected through a living will. *Id.*

⁸ W. VA. CODE § 16-30-3(b) (2002).

⁹A child may petition the court for emancipation. A child over 16 years of age who marries is emancipated by operation of law. Parents and guardians have no right to the custody and control of an emancipated minor. “An emancipated child shall have all of the privileges, rights and duties of an adult. . .” W. VA. CODE § 49-7-27 (2002).

¹⁰A “mature minor” is defined as “a person less than eighteen years of age who has been determined by a qualified physician, a qualified psychologist or an advanced nurse practitioner to have the capacity to make health care decisions.” W. VA. CODE § 16-30-3(o) (2002). *See* W. VA. CODE § 44A-1-4(8) (2002). *See generally, Belcher v. Charleston Area Medical Center*, 188 W. Va. 105, 422 S.E.2d 827 (1992).

¹¹W. VA. CODE § 16-30-4 (2002); W. VA. CODE § 16-30-4(a) (2002), *amended by* Act of March 8, 2007, 2007 W. Va. Laws Ch. 125 (H.B. 3093).

¹²W. VA. CODE § 16-30-6(e) (2002). Further, a medical power of attorney representative and a surrogate may consent to a do-not-resuscitate order on behalf of an incapacitated individual. W. VA. CODE § 16-30C-6(c) (2002).

¹³The HIPAA Privacy Rule treats an adult or emancipated minor’s personal representative as the individual, for purposes of the Rule regarding the health care matters that relate to the representation, including the right of access under 45 C.F.R. § 164.524 (2006). However, there is an exception to the general rule that a covered entity must treat an adult or emancipated minor’s personal representative as the individual. Specifically, the Privacy Rule

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personal representative an opportunity to agree or object to specified uses and disclosures.¹⁴ Nothing in the Privacy Rule changes the way in which an individual appoints another person power of attorney for health care decisions. The intent of the Privacy Rule personal representative provisions is to compliment, not interfere with or change, state laws regarding health care powers of attorney or the designation of other personal representatives. The Privacy Rule personal representative provisions generally grant persons who have authority to make health care decisions for an individual under state law the ability to exercise the HIPAA rights of that individual with respect to health information.¹⁵

does not require a covered entity to treat a personal representative as the individual if, in the exercise of professional judgment, it believes doing so would not be in the best interest of the individual because of a reasonable belief that the individual has been or may be subject to domestic violence, abuse or neglect by the personal representative, or that doing so would otherwise endanger the life, physical safety, or cause substantial harm to the individual. This exception applies to adults and both emancipated and unemancipated minors who may be subject to abuse or neglect by their personal representative. See "Personal Representatives and Minor FAQs" available at U. S. Department of Health and Human Services, <http://www.hhs.gov/hipaafaq/personal/index.html>, last revised March 27, 2007.

¹⁴Patient authorization is not required for a covered entity to use and disclose PHI for treatment, payment or operations. 45 C.F.R. § 164.506(a) (2006). However, HIPAA does require patient authorization for the use or disclosure of PHI involving psychotherapy notes unless the disclosure is used for treatment by the originator of the notes, to conduct training programs under supervision to improve students' skills in mental health counseling, or used to defend a legal action or proceeding brought by the patient. Furthermore, authorization is required to use PHI for marketing purposes unless the covered entity communicates to the individual face-to-face or the communication involves a promotional gift of nominal value provided by the covered entity. 45 C. F.R. §§ 164.506, 508(a)(2) & (3) and 510 (2006); see 45 C.F.R. § 164.502(g)(1) (2006). Additionally, a covered entity must obtain an authorization for any use or disclosure of psychotherapy notes, except: a use or disclosure that is required by § 164.502(a)(2)(ii) or permitted by § 164.512(a); § 164.512(d) with respect to the oversight of the originator of the psychotherapy notes; § 164.512(g)(1); or § 164.512(j)(1)(i). 45 C.F.R. § 164.508(a)(2)(ii) (2006). All other uses and disclosures not specifically exempted under HIPAA require patient authorization. 45 C.F.R. § 164.508(a)(1) (2006).

Covered entities must give the individual the opportunity to object to the use or disclosure of their PHI in facility directories, to family and friends, and for purposes of identification and location of an individual's family, personal representative or other person responsible for the individual's care regarding the individual's location, general condition or death. The individual must also be given the opportunity to object to the use and disclosure of their PHI for disaster relief purposes. 45 C.F.R. § 164.510 (2006). Section 512 delineates the exceptions for which an authorization or the opportunity to agree or object is not required. 45 C.F.R. § 164.512 (2006).

¹⁵A legal representative, although not a personal representative, may be able to obtain information informally as explained in 45 C.F.R. § 164.510(b). In general, the personal representatives provisions are directed at the more formal representatives, while 45 C.F.R. § 164.510(b) addresses situations in which persons are informally acting on behalf of the individual. A covered entity may use or disclose PHI if the PHI is directly relevant to such person's involvement with the individual's care or payment related to the individual's health care. In addition, a

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If a person becomes incapacitated and has not elected another to serve as a personal representative with a medical power of attorney, and there is no court-appointed guardian, pursuant to West Virginia Code Sections §§ 44A-1-1 *et seq.*, the attending physician or advanced nurse practitioner may select a surrogate.¹⁶ The Legislature specifies the manner for selection of the surrogate, including identifying the pool of possible surrogates and the factors to be considered in making the surrogate designation.¹⁷ Like the personal representative medical power of attorney, the surrogate is authorized by state law to make health care decisions on behalf of the individual and to have access to the individual's medical records.¹⁸ Additionally, all the other rights afforded to the individual under HIPAA must be afforded to the surrogate on behalf of the individual,¹⁹ including the right to object to a covered entity releasing confidential information.²⁰

The West Virginia Health Care Decisions Act is not contrary to HIPAA and is thus not preempted. Both laws must be read and applied concurrently. State law defines the medical power of attorney representative and surrogate appointment process, while HIPAA grants the

covered entity may use or disclose PHI to notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death. However, the authority of a personal representative under this rule is limited: the representative must be treated as the individual only to the extent that PHI is relevant to the matters on which personal representative is authorized to represent the individual. *See* 45 C.F.R. § 164.510(b) (2006).

¹⁶W. VA. CODE § 16-30-8 (2002).

¹⁷*Id.*

¹⁸*Id.* at § 16-30-8(c); W. VA. CODE § 16-30-6(c),(e) (2002).

¹⁹45 C.F.R. § 164.502(g)(1) (2006).

²⁰ HIPAA preempts state law and provides an individual involuntarily hospitalized the right to object to the mandatory notice provisions set forth in W. Va. Code § 27-5-3 (2002). If an individual is incapacitated and does not have a designated personal representative, an appointed surrogate may object to notice on behalf of the individual.

medical power of attorney representative and surrogate additional rights.

b. Guardians

West Virginia provides for the court's appointment of a guardian, where the court finds that the individual is a "protected person."²¹ Factors that the court must consider are delineated in statute, and the court is required to choose the least restrictive guardianship possible, such that "the powers shall not extend beyond what is absolutely necessary for the protection of the individual."²² The court can appoint a "limited guardian," where the appointment is limited to specified responsibilities in the order of appointment.²³ West Virginia law identifies the persons and entities qualified to serve as a guardian.²⁴

A guardian has the authority to make an individual's health care decisions.²⁵ In the mental health context, a guardian has authority to sign an individual's consent or authorization for the disclosure of the individual's PHI.²⁶ HIPAA also requires that the guardian enjoy all the other

²¹W. VA. CODE § 44A-2-10(a) (2002). A "protected person" is defined as "an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator." W. VA. CODE § 44A-1-4(13) (2002).

²²W. VA. CODE § 44A-2-10(c) (2002).

²³W. VA. CODE § 44A-1-4(8) (2002).

²⁴W. VA. CODE § 44A-1-8 (2002).

²⁵W. VA. CODE § 44A-3-1 (2002).

²⁶W. VA. CODE § 27-3-2 (2002), amended by Act of March 10, 2007, 2007 W. Va. Laws Ch. 167 (.H.B. No. 3184), eff. June 8, 2007. In the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, where a patient has been adjudicated as lacking capacity to manage his or her affairs, consent may be given by the legal guardian or other person authorized by state law to act in the individual's behalf. 42 C.F.R. § 2.15(a)(1) (2002).

In the context of AIDS, where an individual is unable to give consent to testing, the Legislature has

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HIPAA rights of the individual.²⁷ The guardianship laws are not preempted by HIPAA because they are not contrary to HIPAA and therefore are specifically saved.²⁸

West Virginia mental health and involuntary hospitalization confidentiality laws, as amended in 2007, requires a written and signed consent or authorization for transmission or disclosure of confidential information, which may be executed by a patient or legal guardian.²⁹ To avoid pre-emption, it is reasonable to read the revised statute to permit the patient or legal guardian to exercise his or her HIPAA rights, or the patient or legal guardian may appoint someone else to be the personal representative who can exercise the patient's HIPAA rights.³⁰ For involuntarily hospitalized patients, the Department of Health and Human Resources ("DHHR"), has been charged with developing legislative rules to protect the personal rights of patients. These

delineated a priority of personal representation which must be followed, looking first to whether there is a medical power of attorney and then second as to whether there is a guardian. W. VA. CODE § 16-3C-4(a) (2002). The statute states that "[t]he person's inability to consent shall not be permitted to result in prolonged delay or denial of necessary medical treatment." *Id.* at 16-3C-4(b).

²⁷45 C.F.R. § 164.502(g)(1) (2006). West Virginia law allows a parent, guardian, committee or other personal representative of an individual declared mentally incompetent to petition the court for the individual to be sterilized. W. VA. CODE § 27-16-1 (2002).

²⁸*See* 45 C.F.R. § 164.502(g)(2) (2006). The Supreme Court of Appeals of West Virginia held that the West Virginia Advocates may have access to an individual's PHI if "any person with developmental disabilities who is a client of the system if such person, or the legal guardian, conservator, or other legal representative of such person, has authorized the system to have such access." *West Virginia Advocates, Inc. v. Appalachian Community Health Center, Inc.*, 191 W. Va. 671, 675, 447 S.E.2d 606, 610 (1994) (quoting 42 U.S.C. § 6042). Consequently, the Advocates could also stand in the shoes of the patient with respect to access to PHI, should they be designated to have access. 45 C.F.R. § 164.502(g)(3)(ii)(A) (2006); *see also*, 45 C.F.R. § 164.510(b)(1)(I) (2006).

²⁹W. VA. CODE §§ 27-3-1 and -2 (2007). §27-5-9, . *See* enr. H.B. 3184. Acts of the Legislature 2007.

³⁰W. VA. CODE §§ 27-3-1 through 2, amended by Act of March 10, 2007, 2007 W. Va. Laws Ch. 167 (.H.B. No. 3184), eff. June 8, 2007. Confidential information under this Article may be disclosed without authorization in a final commitment proceeding, hearing to determine competency to stand trial, court order when determination that relevancy of information outweighs need for confidentiality, to protect against clear and substantial danger of imminent injury by patient to self or others; and in accord with good faith efforts to obtain consent and releasing only the minimum necessary, for treatment, payment and health care operations as defined by HIPAA for thirty days from patient's date of admission to a mental health facility. § 27-3-1(b).

rules are pending.³¹

c. HIV-Related Testing

Where an individual is unable to give consent for HIV-related testing or the release of HIV test results, due to mental incapacity or incompetency, the AIDS-Related Medical Testing and Records Confidentiality Act (“AIDS Act”), W. Va. Code § 16-3C-1 through § 16-3C-9, delineates the order of preference for the personal representative, beginning with the durable power of attorney for health care decisions.³² The remaining order of preference includes: legal guardian and next of kin, beginning with the spouse, followed by parent, adult child, sibling, uncle or aunt, and grandparent.³³ Thus, such person acting on behalf of the individual must be treated as the individual’s personal representative with respect to the HIV-related testing or test results and be afforded all of the rights afforded to the individual.³⁴

The West Virginia Supreme Court has carved out an exception to the AIDS Act for those persons that have an AIDS *condition* and are under custodial care of a third party. Based on the

³¹W. VA. CODE § 27-5-9(e), amended by Act of March 10, 2007, 2007 W. Va. Laws Ch. 167 (.H.B. No. 3184), eff. June 8, 2007. Section 9, as amended, charges the Chief Medical Officer for a mental health facility with overseeing the development of the patient’s written clinical records. Minimum information in a patient’s clinical record must include: all matters relating to admission; information regarding legal status; information regarding care and treatment; results of periodic examinations; individualized treatment programs; orders for application for mechanical restraint; and accident reports. In addition, all record documents must be signed by the involved personnel. What is important to note regarding the amendments to § 27-5-9 is what has been deleted. Previously, a mental facility housing an involuntarily committed patient had broad disclosure authority allowing the facility to share confidential medical information in numerous, delineated circumstances. Further, the patient’s attorney could request copies of the client’s medical records even if the records sought were not part of pending litigation.

The second material amendment to § 27-5-9 changes the entity charged with promulgating rules and regulations to implement this code section. Previously, the Board of Health was charged with promulgating rules. However, as amended, the Secretary of the Department of Health and Human Resources is responsible for proposing rules to protect the personal rights of patients.

³²W. VA. CODE § 16-3C-4(a)(1)(2002).

³³*Id.* at § (a)(2) and (3).

³⁴*See* § 164.502(g)(1) and (2).

ruling in *Johnson v. West Virginia University Hospitals, Inc.*, 186 W.Va. 648, 413 S.E.2d 889 (1992), it appears that a health care provider may have a *duty to warn third parties* of the potential risk to HIV exposure *before* the actual exposure occurs.³⁵ The Court distinguishes the language in the statute by saying that this case involves a duty to warn of a *condition*, whereas the AIDS Act's confidentiality provisions are directed toward *AIDS testing*.³⁶

Following this 1992 Court decision, the legislature in 2000 adopted a rule that supplements and further implements the AIDS Act.³⁷ The rule appears to further clarify two of the exceptions to the general rule of confidentiality. First, the rule allows for agents or employees of a health facility or health care provider to have access to HIV test results "when the information is medically necessary to protect the individual from a significant risk of transmission." This exception appears to allow a health care facility to release to its employees and agents the results of an HIV test when the employee or agent is at risk for exposure.

Second, West Virginia C.S.R. § 64-64-9.5 (2000) allows for HIV test results "to be disclosed to medical or emergency responders who have been subject to a significant exposure during the course of medical practice or in the performance of professional duties." This exception allows for the disclosure as long as there has been a "significant exposure" which is further defined by the Act and generally requires actual exposure to blood or body fluids.

³⁵ This West Virginia Supreme Court decision harmonizes with the HIPAA exception, which allows for disclosure of PHI to avert serious threat to health or safety. According to HIPAA, a covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and a person is reasonably able to prevent or lessen the threat, including the target of the threat. 45 C.F.R. § 164.512(j) (2006).

³⁶ *Johnson*, 413 S.E.2d at 895.

³⁷ W.Va. C.S.R. § 64-64-1 (2000)

2. Unemancipated Minors

Under HIPAA, if under applicable law, a parent, guardian or other person acting *in loco parentis* has authority to act on behalf of an unemancipated minor in making decisions related to health care, a covered entity must treat the person as the individual's personal representative with respect to use and disclosure of PHI, except in three situations.³⁸ HIPAA "saves" state law *in loco parentis* provisions and does not preempt them.

West Virginia adheres to the common law rule of parental consent for unemancipated minors.³⁹ West Virginia also recognizes the mature minor exception as part of the common law rule.⁴⁰ Consequently, a parent generally serves as the minor's personal representative with respect to the exercise of his or her HIPAA rights. In a mature minor situation, where the parent does not serve as the minor's personal representative, the parent would generally (subject to certain statutory objections) be able to access the minor's PHI through the general parental access statute, which requires that each parent "have full and equal access to a child's medical records

³⁸45 C.F.R. §164.502(g)(3)(i) (2006). See Privacy Preamble, 67 Fed. Reg. 53, 199 (Aug. 14, 2002).

³⁹*Belcher v. Charleston Area Medical Center*, 188 W. Va. 105, 422 S.E.2d 827 (1992).

⁴⁰The Supreme Court of Appeals of West Virginia adopted the mature minor exception to the common law rule of parental consent. The Court held that:

Whether a child is a mature minor is a question of fact. Whether the child has the capacity to consent depends upon the age, ability, experience, education, training, and degree of maturity or judgment obtained by the child, as well as upon the conduct and demeanor of the child at the time of the procedure or treatment. The factual determination would also involve whether the minor has the capacity to appreciate the nature, risks, and consequences of the medical procedure to be performed, or the treatment to be administered or withheld. Where there is a conflict between the intentions of one or both parents and the minor, the physician's good faith assessment of the minor's maturity level would immunize him or her from liability for the failure to obtain parental consent.

Id. at 116.

absent a court order to the contrary.”⁴¹

With respect to HIV-related testing or the authorization of the release of the test results, West Virginia law delineates the order of preference for personal representatives.⁴² Where the health care provider does not apply the mature minor rule, this statute dictates the choice of personal representative, which would generally result in the parent serving in this capacity. Where the mature minor rule is applied and no parental consent is required, the issue arises as to whether W.Va. Code § 16-3C-3(a)(1), which requires disclosure only to the subject of the test, trumps the general parental access statute, W.Va. Code § 48-9-601(b)(1). Applying the more specific law results in enhanced privacy to the mature minor and yields a result encouraging testing.

a. Appointing a Guardian

A parent may appoint a guardian for his or her child through a will. Where both parents have appointed guardians, only that guardian who is the appointee of the parent last living is entitled to the custody of the child.⁴³ If the parent fails to appoint a guardian through his or her will, a guardian may be appointed by the circuit clerk.⁴⁴ A court may also name an individual as

⁴¹W. VA. CODE § 48-9-601(b)(1) (2002). This statute’s primary purpose is to ensure that following divorce both the custodial and noncustodial parents have equal access to the minor’s medical records. The statute goes further to require both parents to inform the other of any illness requiring medical attention and to consult with the other with regard to elective surgery. The Legislature states that this statute does not alter other state laws that deal with parental consent. *Id.* at 48-9-601(b)(2) – (3).

⁴²W. VA. CODE § 16-3C-4(a)(1) – (3) (2002).

⁴³W. VA. CODE § 44-10-1 (2002).

⁴⁴W. VA. CODE § 44-10-3 (Supp. 2006). While the Code provides that this function is to be performed by the county court, it is performed by the circuit court.

guardian or custodian for a child in situations of neglect and abuse.⁴⁵ Where a child is in the custody of either a guardian or custodian, the guardian or custodian has the same responsibility as the parent for providing care for the child, including health care.⁴⁶ Thus, the guardian or custodian stands *in loco parentis* to the child and can consent to medical treatment in the same way that a parent consents to treatment under common law.⁴⁷ Therefore, the guardian or custodian stands in the parents' shoes with respect to exercising the minor's HIPAA rights.

The State of West Virginia may serve as the child's guardian or custodian in many situations.⁴⁸ When the director of the Division of Juvenile Services has legal or physical custody of a child, the director has the authority to "consent to the [juvenile's] medical or other treatment . . ." Where DHHR has a child in its custody, DHHR has the authority to consent to medical treatment on behalf of the child.⁴⁹ In situations where DHHR is named guardian, it can also consent to medical treatment.⁵⁰ In these situations, the State stands in the shoes of the parent and

⁴⁵W. VA. CODE §§ 49-2-17 (2002); W. VA. CODE § 49-6-5 (Supp. 2006); W. VA. CODE § 49-6-5a (Supp. 2006); W. VA. CODE § 49-6-2 (Supp. 2006); W. VA. CODE § 49-6-3 (Supp. 2006).

⁴⁶See W. VA. CODE § 49-6B-1 (2002); W. VA. CODE § 49-1-3(h), amended by Act of March 5, 2007, 2007 W. Va. Laws Ch. 31 (.S.B. No. 626), eff. June 3, 2007; (*In re Destiny Asia H.*, 211 W. Va. 481, 566 S.E.2d 618 (2002)).

⁴⁷See 39 AM.JUR. 2D *Guardian and Ward* § 97 (2003); Uniform Guardianship and Protective Act (U.L.A.) of 1997 § 208(b).

⁴⁸W. VA. CODE §§ 49-5-1 (2002) *et seq.* and 49-6-1 (Supp. 2005) *et seq.*

⁴⁹44 W. Va. Op. Atty. Gen. 213 (1951). Further, the code is replete with references to the State's requirement to provide "care" to the child. See *e.g.*, W. VA. CODE § 49-6-5 (Supp. 2006). Further, the Supreme Court of Appeals of West Virginia has held that in cases of abuse and neglect, the State must serve as "Parens patriae . . . In loco parentis . . . to protect the health, welfare and sometimes the very life of a child . . ." *State of ex. rel. the West Virginia Dept. of Health & Human Resources v. Fox*, 218 W.Va. 397, 402-403, 624 S.E.2d 834, 839-840 (2005) (quoting *In re Willis*, 157 W. Va. 225, 240, 207 S.E.2d 129, 138 (1973)).

⁵⁰See *id.* In West Virginia, W. VA. CODE § 49-6-5, where a court can order DHHR to be the permanent guardian, the order must take into account the child's continuity of care and other factors. A goal of the state welfare system is to "[a]ssure each child's care" and to "[s]erve the mental and physical welfare of the child . . ." W. Footnote Continued on Next Page

must be treated as the child's personal representative with respect to the child's HIPAA rights.

Additionally, West Virginia allows for the appointment of special guardians to procure, consent to and authorize necessary medical treatment where the minor is threatened with the substantial possibility of "death, serious or permanent physical or emotional disability, disfigurement or suffering . . ." where the parent, guardian or custodian fails to obtain the necessary care.⁵¹ In the same way, a special guardian must be treated as the minor's personal representative with ability to exercise the minor's HIPAA rights with respect to his or her PHI.

b. Exceptions to Parental Consent

Where a state law exception does not apply, a parent may generally serve as a minor's personal representative. Pursuant to HIPAA, there are three exceptions to the general rule of parental consent. First, a parent cannot be a personal representative where the minor consents to care, the parent's consent is not required, and the minor has not requested that the parent serve as a personal representative. Second, a parent may not be a personal representative of a minor where the minor lawfully obtains health care without parental consent and the minor, court or other authorized person consented to the health care. Third, where the parent agrees that the minor can have a confidential relationship with the provider, the parent cannot serve as the minor's personal representative.⁵²

However, under HIPAA, even where a parent cannot serve as the minor's personal

VA. CODE § 49-1-1 (2002); *see* W. VA. CODE § 49-2-1 (2002); W. VA. CODE § 49-2-16 (2002). Finally, the term "guardian" is defined as "a person who has care and custody of a child. . ." W. VA. CODE § 49-1-4, amended by Act of March 5, 2007, 2007 W. Va. Laws Ch. 31 (.S.B. No. 626), eff. June 3, 2007.

⁵¹W. VA. CODE § 49-6B-1 (2002).

⁵²45 C.F.R. § 164.502(g)(3)(i)(A), (B) and (C) (2006).

representative, he or she has a right of access to the minor's PHI where state or other law permits or requires access. If state or other law denies a parent access, access is also denied under HIPAA. Finally, where state or other law is silent as to the parent's access, a licensed health care professional may provide or deny access to a parent, based upon the exercise of his or her professional judgment.⁵³

The Legislature carved out several areas of health care treatment where parental consent is not required to treat a minor. These areas include: abortion, treatment for venereal disease, treatment for addiction to alcohol and controlled substances, blood donation⁵⁴ and family planning services.

c. Abortion

West Virginia law requires parental notification of a physician's intent to perform an abortion on a minor. The physician must advise the minor that she can petition the court for waiver of notification to her parents. The notification requirement may be waived, without going to court, if a second physician finds that "the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interest."⁵⁵

West Virginia law requires parental notification, not consent. Where the minor consents to the abortion and has not named a parent to serve as a personal representative, abortion falls within the first exception to the HIPAA *in loco parentis* doctrine.⁵⁶ Because consent is not

⁵³45 C.F.R. § 164.502(g)(3)(ii)(A), (B) and (C) (2006).

⁵⁴A 17 year old minor may donate blood without parental authorization. W. VA. CODE § 16-21-1 (2002).

⁵⁵W. VA. CODE § 16-2F-3(c) (2002). These notification requirements do not apply where there is an emergency need for an abortion. W. VA. CODE § 16-2F-5 (2002).

⁵⁶See 45 C.F.R. § 164.502(g)(3)(i)(A) (2006).

required for an abortion to be performed on a minor, the parent is not treated as a personal representative.

The issue remains as to whether a parent can obtain access to the minor's PHI through HIPAA, which states that a parent has access to a minor's records "to the extent, permitted or required by an applicable provision of State or other law . . ." ⁵⁷ This law is silent as to parental access to PHI. However, W.Va. Code § 16-29-1(b), which delineates the situations where a parent cannot access the minor's PHI without authorization, does not list abortion and this statute was last amended in 1992; the abortion section of the code, W.Va. Code § 16-2F-1, *et seq.*, was passed in 1984. Additionally, a court could turn to the general parental access statute, W.Va. Code § 48-9-601(b)(1), and find that a parent can access the minor's abortion PHI. At the same time, West Virginia law denies access to the parent or guardian to the minor's birth control and prenatal care records. ⁵⁸ Does the Legislature really intend a fractured approach to parental access to these records? Because the general parental access statute seems to govern, the conservative approach would dictate parental access.

d. Treatment for Venereal Disease

West Virginia allows "any licensed physician [to] examine, diagnose, or treat any minor with his or her consent for any venereal disease without the knowledge or consent of the minor's parent or guardian." ⁵⁹ Like abortion, treatment for venereal disease falls within the first

⁵⁷45 C.F.R. § 164.502(g)(3)(ii)(A) (2006). If state or other law denies access, then HIPAA denies access. 45 C.F.R. § 164.502(g)(3)(ii)(B) (2006). Where there is no access provision under state or other law, a covered entity may grant or deny access based upon a licensed health care professional's exercise of professional judgment. 45 C.F.R. § 164.502(g)(3)(ii)(c) (2006).

⁵⁸W. VA. CODE § 16-29-1(b) (2002).

⁵⁹W. VA. CODE § 16-4-10 (2002).

exception to the HIPAA *in loco parentis* doctrine;⁶⁰ because parental consent is not required, the minor has consented and has not named the parent as a personal representative, the parent may not stand in the shoes of the individual as the personal representative.⁶¹

West Virginia law precludes a parent's access to the minor's PHI without the minor's authorization.⁶² Because state law precludes parental access to a minor's PHI regarding venereal disease, HIPAA does as well.⁶³

e. Treatment for Addiction to Alcohol and Controlled Substances

West Virginia law approaches minors' rights with respect to treatment for addiction to alcohol⁶⁴ and to controlled substances⁶⁵ identically. In both situations, a minor has the right to consent to his or her own treatment for addiction to alcohol and to controlled substances, without parental knowledge or consent. Additionally, West Virginia law precludes a health care provider from disclosing PHI regarding "drug rehabilitation or related services;"⁶⁶ HIPAA looks to state law and denies access as well.⁶⁷ Therefore, a parent cannot serve as a minor's personal

⁶⁰In 1974, Attorney General Chauncey H. Browning, Jr. issued an opinion regarding this statute. 56 W. Va. Op. Atty. Gen. 32 (1974). Mr. Browning states that the Legislature recognized "that there are conditions, specifically, venereal disease, for which the minor is often likely to seek medical assistance without the knowledge of a parent. To require parental consent in all situations concerning this condition is to create a risk that the minor will delay or forego necessary treatment to avoid explanation to his or her parent." *Id.*

⁶¹See 45 C.F.R. § 164.502(g)(3)(i)(A) (2006).

⁶²W. VA. CODE § 16-29-1(b) (2002).

⁶³See 45 C.F.R. § 164.502(g)(3)(ii)(B) (2006).

⁶⁴W. VA. CODE § 60-6-23 (2002).

⁶⁵W. VA. CODE § 60A-5-504(e) (2002).

⁶⁶W. VA. CODE § 16-29-1(b) (2002).

⁶⁷See 45 C.F.R. § 164.502(g)(3)(ii)(B) (2006). The federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records indicate that if a minor can consent to alcohol or drug abuse treatment
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representative, without the minor's request for him or her to do so, and has no independent right of access to the minor's PHI regarding addiction to and treatment for alcohol or controlled substances.

f. Family Planning Services

West Virginia law does not address the issue of parental consent with regard to a minor's right to receive birth control. However, West Virginia law precludes a parent or guardian from accessing a minor's birth control PHI.⁶⁸ Where state law prohibits parental disclosure, HIPAA does as well.⁶⁹ The United States District Court for the Southern District of West Virginia held that federally funded health care providers cannot require parental consent for treatment for contraceptive care for a minor.⁷⁰ The Court stated that "[e]ven without protections afforded by the regulatory and constitutional rights involved, it would be unthinkable that any court within this State would impose liability under any circumstances pertinent to this case for the rendering of informed, well-trained medical care and family planning services."⁷¹ To require parental consent for treatment of a minor for birth control by health care providers not receiving the federal family planning monies, while denying access to the underlying records, would lead to incongruous results. Because a minor has the right to protect the confidentiality of her birth control PHI, she should be able to consent, without her parent's knowledge, to the care or

under state law, then any required consent can only be given by the minor. 42 C.F.R. § 2.14(b) (2002).

⁶⁸W. VA. CODE § 16-29-1(b) (2002).

⁶⁹45 C.F.R. § 164.502(g)(3)(ii)(B) (2006).

⁷⁰*Doe v. Pickett*, 480 F. Supp. 1218 (S.D. W. Va. 1979).

⁷¹*Id.* at 1223.

treatment that generated the PHI. Given West Virginia's prohibition on disclosure of birth control PHI to parents absent the minor's authorization, and the strong public policy reasons to make this care available, a West Virginia court would probably find that the common law rule of parental consent does not apply to a minor's right to family planning services. Notwithstanding the foregoing, health care providers could avail themselves of the mature minor exception in this situation, document their determination of mature minor status in the chart, and decide not to require parental consent. Therefore, absent the minor's authorization, generally, a parent cannot serve as a minor's personal representative with respect to exercising HIPAA rights.⁷²

3. Deceased Individuals

HIPAA provides that where "an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation."⁷³ West Virginia state law gives authority to executors and administrators to act on behalf of the decedent's estate.⁷⁴ Therefore, executors and administrators may serve as the deceased individual's personal representative and exercise the individual's HIPAA rights.⁷⁵

⁷²See 45 C.F.R. § 164.502(g)(3)(i)(A) (2006).

⁷³45 C.F.R. § 164.502(g)(4) (2006).

⁷⁴W. VA. CODE § 44-1-1 *et seq* (2002). West Virginia Code Section 44-1-1(2002) indicates that an executor achieves his power upon qualification. West Virginia Code Section 44-1-4 (2002) relates to the appointment of an administrator. The remainder of Chapter 44 lays out executors' and administrators' power and authority.

⁷⁵West Virginia does not allow someone holding a durable power of attorney to act on behalf of the decedent. In West Virginia, a durable power of attorney terminates with the death of the principal, such that the attorney in fact has actual knowledge of the death of the principal. W. VA. CODE §§ 39-4-4 and 39-4-5 (2002).

Under West Virginia law, an attending physician may perform an autopsy upon obtaining consent in writing or by telephone.⁷⁶ To the extent that the PHI of the decedent is authorized by this state law to be used or disclosed by a telephone call, this law is preempted by HIPAA, as HIPAA requires written authorization, thus providing more protection to the decedent.⁷⁷

HIPAA permits PHI to be disclosed to funeral directors as needed, and to coroners or medical examiners to identify a deceased person, determine the cause of death, and perform other functions authorized by law.⁷⁸

⁷⁶W. VA. CODE § 16-4B-1 (2002).

⁷⁷See 45 C.F.R. § 164.508(b) (2006).

⁷⁸See 45 C.F.R. § 164.512 (2006).